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No. 99-1786

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, EARTH SYSTEMS, INC., AND THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.

Petitioners,

v.

JANETTE KNUDSON AND ERIC KNUDSON,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* OF SELF-INSURANCE INSTITUTE OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The Self-Insurance Institute of America, Incorporated (SIIA) moves for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2(b). This brief is filed with the consent of Petitioners, and a letter reflecting this consent has been filed with the Clerk of the Court. Respondents, Janette Knudson and Eric Knudson, have withheld their consent to the filing of this brief.

The issue in this case complements the issue in *Cement Masons Health & Welfare Trust Fund for Northern Cal.v. Stone,* 197 F.3d 1003 (9th Cir. 1999), *petition for cert. filed,* 68 U.S.L.W. 3566 (U.S. Feb 22, 2000)(No. 99-1403).

Last week, on May 30, 2000, the Court invited the Solicitor General to file an *amicus curiae* brief in *Stone*, and granted motions for leave to file *amicus curiae* briefs by: Health Insurance Association of America; International Training Institute for Sheet Metal and Air Conditioning Industry; Multiemployer Trust Funds; and Central States, Southeast and Southwest Areas Health and Welfare Fund.

There is currently a split among the circuits as to whether an employee benefit plan fiduciary may seek to recoup benefits paid in third-party liability situations under ERISA Section 502(a)(3) when the remedy involves a monetary recovery.

For this reason, SIIA respectfully requests that its Motion For Leave To File *Amicus Curiae* Brief be granted.

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INTEREST OF *AMICUS CURIAE*

The Self-Insurance Institute of America, Inc. (SIIA) submits this brief in support of Great-West Life & Annuity Insurance Company, Earth Systems, Inc., and the Health and Welfare Plan for Employees and Dependants of Earth Systems, Inc.'s Petition for a Writ of Certiorari.[1]

SIIA is a non-profit corporation having over 700 members, representing almost fifteen million Americans, dedicated to the advancement and protection of the self-insurance industry. SIIA's membership includes users of self-insurance such as employer plan sponsors, as well as service providers such as third-party administrators, reinsurance companies, and other entities engaged in the self-insurance business. SIIA is the only association in the U.S. which represents firms, professionals, and organizations which participate in the broad spectrum of self-insurance, including self-insured group health plans.

Through SIIA, its members coordinate their views and provide practical information and recommendations to government and the public on how the self-insurance system functions, and on the impact of government regulations and interpretations under the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. §§ 1001 *et seq.*, concerning self-insured health plans and plan participants. This includes rendering assistance to courts in their deliberations on significant self-insured health plan issues of broad concern to members.

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[1] Counsel of record for SIIA, Mark Spencer, certifies pursuant to Supreme Court Rule 37.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

SIIA has an interest in the ERISA pre-emption issue presented in this case -- whether an employee benefit plan fiduciary may seek to recoup benefits paid in third-party liability situations under ERISA Section 502(a)(3) (29 U.S.C. § 1132(a)(3)) when the remedy involves a monetary recovery.

First, the issue presented is of major concern to the self-insurance industry because the rising cost to employers of providing health benefits will escalate if self-insurance plans are not able to recoup their losses in third-party tortfeasor situations using the tools Congress supplied under ERISA. This will result either in reduced health care benefits, or higher out-of-pocket costs for participants in the form of higher co-payments and deductibles, or both. The Ninth Circuit's decision may even threaten the continued viability of self-insurance as a cost-effective alternative for providing health benefits to millions of employees.

Second, because many SIIA employer members operate on a multi-state basis, they are legitimately concerned that any erosion of ERISA's pre-emption provisions will lead to plans abandoning attempts to recover money paid to participants. These participants agreed to reimburse the plan if they received money from a third-party tortfeasor, but later may decide to keep the double recovery and hide behind the state court system at the expense of other plan participants. This is exactly what Congress intended to avoid by enacting ERISA.

ARGUMENT

The Issue in this Case, Involving Abdication of Exclusive Federal Jurisdiction Within a Completely Pre-empted Field, Affects the Interests of Millions of Participants in Self-Insured and Fully-Insured Benefit Plans.

When it enacted ERISA, Congress found that the growth in numbers and size of employee benefit plans had been substantial, and that "the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest. . . ." 29 U.S.C.§ 1001(a). The stated policy of ERISA is "the interests of participants in employee benefits plans . . . by providing for *appropriate remedies*, sanctions, and *ready* access to the Federal courts."[2] 29 U.S.C. § 1001(b)(emphasis added).

Congress capped off the federal legislation with a pre-emption provision that has been described as "sweeping." *See* 29 U.S.C. § 1144(a).[3] ERISA pre-emption is so powerful that it displaces not only state legislation, but *any* form of state action including state lawsuits that "relate to" benefit plans. *See* 29 U.S.C. § 1144(c)(1)(broadly defining "state action"). Pre-emption of state law is even more forceful with respect to "self-insured" plans (as opposed to "fully-insured" plans). *See* 29 U.S.C. § 1144(b)(2).[4]

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[2] 29 U.S.C. § 1001(b).

[3] *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 746 (1985)(ERISA pre-emption provision is "sweeping").

[4] Under ERISA's "savings clause," state laws that regulate the "business of insurance" are saved from pre-emption. *See* 29 U.S.C. § 1144(b)(2)(A). However under ERISA's

ERISA also includes a civil enforcement section that establishes exclusive federal civil causes of action. *See* 29 U.S.C. § 1132(a). When read in connection with ERISA's pre-emption provisions, this civil enforcement section is so powerful as to displace any state cause of action within the pre-empted field. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-63 (1987). Such actions are "necessarily federal in character" and may be removed from state court even if the federal question does not appear on the face of the plaintiff's well-pleaded state court complaint. *See id.* at 63-64. A corollary to this rule is that ERISA jurisdiction cannot be avoided through "artful pleading."[5]

Congress also included various "tools" to protect the federal nature of these federal civil actions. This includes for example, nationwide service of process under 29 U.S.C. § 1132(e)(1), which permits service wherever the defendant resides or may be found, thus avoiding Fourteenth Amendment minimum contacts hurdles to service of process. *See, e.g., Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1210 (10th Cir. 2000).

"deemer clause," benefit plans cannot be "deemed" to be in the business of insurance. *See* 29 U.S.C. § 1144(b)(2)(B). The result is that certain state laws which regulate the business of insurance are not preempted with respect to fully insured plans, but remain preempted with respect to self-funded plans. *See generally Mertens v. Hewitt Assoc's*, 508 U.S. 248 (1993), for a discussion of this distinction. As noted above, the Self-Insurance Institute of America has a significant interest in the regulation of self-insured benefit plans.

[5] *See generally Caterpillar, Inc. v. Williams*, 482 U.S. 386, 397 (1987)(where Congress intended complete pre-emption of state law, the "artful pleading" doctrine cannot be invoked).

Similar to nationwide service in federal interpleader situations, *see* 28 U.S.C. § 1367, this permits parties to "lock" all interested or potentially interested parties to dispute into a single lawsuit regardless of where they happen to reside. This is very important for example, when there are numerous participants, beneficiaries, fiduciaries, and other parties interested in the dispute. Plans have sue-or-be-sued status so that they can be "heard" in federal court. *See* 29 U.S.C. § 1132(d)(1). Conflicting state laws are pre-empted. See 29 U.S.C. § 1144(a).

Finally, ERISA's civil actions are equitable in nature, meaning that courts can fashion a wide variety of remedies tailored to fit a particular situation. *See, e.g., Pane v. RCA Corp.*, 868 F.2d 631, 636 (3rd Cir. 1989). This is especially true in cases such as the one at bar arising under 29 U.S.C. § 1132(a)(3). *See Mertens v. Hewitt Assoc's*, 508 U.S. 248, 253-54 (1993). It also means that court-imposed remedies are enforceable through contempt, rather than through expensive and cumbersome state remedies such as "execution." *See, e.g., Pane*, 868 F.2d at 636.

One of ERISA's civil actions – the one at issue here is 29 U.S.C. § 1132(a)(3) – permits a plan fiduciary to bring an action for injunctive and equitable relief to enforce the provisions of ERISA and/or the terms of the plan, or to redress violations thereof. *See generally Mertens*, 508 U.S. at 253-54. This is a broad and open-ended statute that can encompass an almost infinite variety of situations where a person or entity has violated or is attempting to evade ERISA and/or the terms of the plan. *See id.* One of those situations is the one at bar, where a plan participant is violating a plan's terms requiring subrogation and reimbursement. *See id.* at 253.

Typically, these disputes arise in the context of a catastrophic injury to a plan participant by a third party. *See generally FMC Corp. v. Holliday*, 498 U.S. 52 (1990). The plan pays a significant sum to satisfy the participant's

medical bills. The participant then sues the tortfeasor and recovers a significant sum, but refuses to reimburse the plan. This results in a significant loss of plan assets (which must be borne by the plan participants or sponsor) and a double recovery to the injured participant (who has his/her bills paid in full and also recovers damages in the tort action).

To protect against this, many plans include provisions that give the plan a lien on any recovery by the participant, and require the participant to reimburse the plan from any recovery. These are "terms of the plan" within the meaning of 29 U.S.C. § 1132(a)(3). But frequently, participants and their attorneys, who are often in highly sympathetic positions, try to artfully craft ways to avoid the plan's subrogation/reimbursement provisions. This includes, for example, structured settlements, payments to persons other than the participant, agreed "findings" in the tort action that are "binding" on the participant, state declaratory actions, etc. Within this pre-empted field, however, these are merely "artful" efforts to violate the subrogation and reimbursement terms of the plan.

Congress provided a federal remedy under Section 1132(a)(3), which permits a plan fiduciary to file a federal cause of action to enforce the relevant terms of the plan, and to redress violations thereof. This is part of the "*ready* access" to federal courts envisioned by Congress. *See* 29 U.S.C. § 1001(b).

The attendant tools that accompany such federal actions -- nationwide service of process, sue-or-be-sued status, enforcement through contempt, etc. -- all operate to allow the plan to recover its losses, recoup its assets, maintain its financial integrity, and be restored to its former position. It also protects participants and beneficiaries

collectively in that restoration of funds ensures assets to pay future claims.[6]

Typically, the injured participant and the participants' attorneys, however, seek to evade their reimbursement obligations under plain terms of the plan. They characterize the plan's claim as one arising under state law, and argue that the plan must negotiate a maze of traditional state law hurdles such as restricted service of process, minimum contacts, discovery, jury trials, execution procedures, etc. to recover the lost assets.

But ERISA pre-empts these "state laws," which are defined as such under 29 U.S.C. § 1144(c)(1). This Court recently reaffirmed that the legislative purpose behind Section 1144(a) is "to ensure that plans and plan sponsors would be subject to a *uniform body of benefits law*; the goal was to *minimize the administrative and financial burden of complying with conflicting directives among States* or between States and the Federal Government..., [and to prevent] *the potential for conflict in substantive law...requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.*" *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 US 645, 656-57 (1995) (emphasis added).

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[6] In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141-42 & n. 9 (1985), this Court held that ERISA's fiduciary regulatory scheme was designed to protect the participants and beneficiaries collectively, rather than to protect individual participants. Similarly, in ERISA restitution actions by plan fiduciaries under 29 U.S.C. § 1132(a)(3), federal courts should be primarily concerned about the welfare of the participants and beneficiaries collectively, rather than the welfare of a specific participant.

A lawsuit by a fiduciary to enforce the terms of a plan – whether those terms require subrogation, reimbursement, or other action – or a lawsuit to redress violations of such terms, falls squarely within the scope of Section 1132(a)(3). These lawsuits should be subject to a uniform body of federal law, and benefit plans should not be required to enforce their subrogation and reimbursement provisions based on the nuances and peculiarities of the state where the offending participant happens to be located.

Participants cannot avoid ERISA through "artful pleading," and federal courts should not be permitted to avoid ERISA through "artful" reasoning. In fact, federal district courts have *exclusive* jurisdiction over such actions. *See* 29 U.S.C. § 1132(e)(1). Federal courts have an unflagging obligation to exercise their exclusive jurisdiction over such actions. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 203 (1988); *Thermtron v. Hermansdorfer*, 423 U.S. 336 (1976).

Unfortunately, there is a willingness by some federal courts to shirk this responsibility through what can only be called "artful opinion drafting" – the judicial equivalent of "artful pleading." Some federal courts, including the lower courts in this case, employ *Thermtron*-like logic[7] to divest themselves of cases that fall squarely within their jurisdiction. While this has the effect of lightening the federal caseload[8] and helping individual

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[7] *See Thermtron v. Hermansdorfer*, 423 U.S. 336 (1976). In *Thermtron*, this Court held that federal district courts cannot remand cases simply because they are "too busy" or do not want to adjudicate them.

[8] *Thermtron*-like disposal by federal courts of actions that fall within 29 U.S.C. § 1132(a)(3) is becoming especially prevalent in the context of removed actions, perhaps due largely to the fact that such orders are essentially non-reviewable. *See generally* Thomas R. Hrdlick, *Appellate*

participants in sympathetic circumstances retain large sums, it has a devastating financial effect on benefit plans, especially self-insured ones, and their participants and beneficiaries *collectively*.

The Ninth Circuit is rife with examples of such cases. *See, e.g., Barnes v. Independent Auto. Dealers.*[9] In *Barnes*, the Ninth Circuit adopted the make-whole rule. This rule mandated that plans pay for the medical expenses of injured participants and only then may the plans seek subrogation. The Ninth Circuit even held that the make-whole rule would not permit double recovery and that it was consistent with ERISA's related purpose of maintaining the interest of other employees in their benefit plans.[10] That was the Ninth Circuit's first barrier to plan recovery actions.

Here, the Ninth Circuit placed another hurdle in the path at such actions by holding that ERISA jurisdiction does not exist because the plan is seeking "money" rather than equitable relief. However, the Ninth Circuit previously held that Congress intended to provide courts with a "broad authority to fashion remedies." *See Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983). Furthermore, the Ninth Circuit held in *Donovan* that "an order to pay money under ERISA is enforceable through contempt." *See id.* at 1240. Now, according to the Ninth Circuit, whenever a plan attempts to recover assets by filing a lawsuit to enforce its subrogation or reimbursement provisions, the action is not governed by ERISA Section 29 U.S.C. § 1132(a)(3), but is instead purely a matter of state concern.

Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?, 82 Marq. L. Rev. 535 (1999).

[9] 64 F.3d 1389 (9th Cir. 1995).

[10] *Id.* at 1395.

This misses the point completely. Under ERISA, benefit plans must have ready access to the federal courts – and to the attendant tools that accompany federal actions under ERISA – to *enforce the terms of the plan* that require the participant to reimburse the plan for expenditures made on behalf of the participant, and to *redress violations* of such terms. This is in the nature of an "equitable" action for *specific performance* of the terms of the plan, *disgorgement* of wrongfully withheld funds, *restitution* of plan assets, etc. The mere fact that an equitable order requires the payment of money does not necessarily convert the case into a "legal" action.

Proof lies in this Court's decision in *Taylor*. *Taylor* held that an action by a plan participant seeking payment of "money" or "money damages" (*i.e.*, plan benefits) under a plan through a state law theory does not render the action exempt from ERISA. *See Taylor*, 481 U.S. at 62-63. Conversely, an action by a plan or a plan fiduciary seeking "money" (i.e., wrongfully withheld funds) from a plan participant is not exempt from ERISA. This conclusion is reinforced by ERISA's jurisdictional statute, which gives state courts *concurrent* jurisdiction over the former cases, but gives federal courts *exclusive* jurisdiction over the latter cases. *See* 29 U.S.C. § 1132(e)(1).[11]

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[11] Actions by plan fiduciaries for the recovery of plan assets fall under 29 U.S.C. § 1132(a)(3), and thus within the *exclusive* jurisdiction of the federal courts, whereas actions by participants for the recovery of benefits fall under 29 U.S.C. § 1132(a)(1)(B), *see Taylor*, 481 U.S. at 62-63, and thus within the *concurrent* jurisdiction of both state and federal courts. *See* 29 U.S.C. § 1132(e)(1). Consequently, federal courts should guard their jurisdiction *even more closely* in cases such as this one than in benefit disputes that are federalized under *Taylor*.

CONCLUSION

When federal courts abdicate their exclusive jurisdiction in these cases, as occurred here, participants are able to avoid ERISA and thus require plans to pursue recovery under varying and often inconsistent state laws. This includes expensive and time consuming discovery, trials, counterclaims, and other roadblocks. This is exactly what Congress intended to avoid by providing 29 U.S.C. § 1132(a)(3) and "ready access to federal courts" which provides more vigorous protection of employee benefit plans. The Ninth Circuit's decision in the present case provides participants and their lawyers that seek double recovery an opportunity to abuse the system at the expense of other participants.

Respectfully Submitted,

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